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Four Yearly Review of
Modern Awards: AM2015/1
Family & Domestic Violence
Clause Common Issue
Proceedings
Further Submissions

28 November 2016

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1. POSITION IN SIMPLICITER

- 1.1 The Australian Chamber abhors violence in any form.
- 1.2 These proceedings have canvassed in detail the difficult circumstances of persons experiencing family and domestic violence, and the effect that such experience can have on people's lives.
- 1.3 Particularly for those most vulnerable to the effects of family and domestic violence (the group whom the ACTU has principally focussed) and particularly in its most serious forms, family and domestic violence is a repulsive form of crime which cannot be accepted or tolerated.
- 1.4 While little reference was made in these proceedings to the perpetrators of family and domestic violence, there is no doubt or argument that family and domestic violence exists within Australia and that it is "a social issue". Like any social issue, family and domestic violence is complex and gives rise to a raft of social, cultural, legal and human challenges.
- 1.5 These proceedings have also disclosed that the Australian system (in a legal, housing and social sense) can improve its support for those experiencing family and domestic violence.
- 1.6 If these proceedings were a social or political debate, the questions raised by it may well be answered differently.
- 1.7 This is not a social policy debate however. This is an industrial proceeding within the context of the 4 Yearly Review about minimum standards of employment contained in individual modern awards which are to be reviewed in their own right and weighed against the requirements of ss 134, 138 and 156 of the *Fair Work Act 2009 (Cth)* (**Act**).
- 1.8 In the submission of the Australian Chamber, this case therefore renders down to a simple question.
- 1.9 Has a sufficient case been put before the Full Bench to warrant the exercise of its discretion to insert 10 additional days of paid leave for all award covered employees into all modern awards (**DVL**)?
- 1.10 It is our submission that in order to do so, the Commission would need to be satisfied that such an exercise of discretion would be in satisfaction (only to the extent necessary) of the modern awards objective.
- 1.11 Such a case has not been made out.
- 1.12 The evidence has disclosed that those persons experiencing family and domestic violence who require flexibility in relation to their permanent work arrangements can currently access a minimum of 10 days paid personal/carer's leave where they require time off because of a personal illness or personal injury. This may include time off required to see a health provider such as a medical practitioner, physiotherapist, dentist, psychologist or therapist. Such persons can access the same bank of leave to provide care or support to a member of their immediate family who requires care or support because of personal injury or an unexpected emergency as a result of family and domestic violence.
- 1.13 For any leave which would not fit within the framework of personal/carer's leave, namely leave required to attend court, financial counselling or to relocate (or for any personal/carer's leave that was in excess of 10 days) permanent employees are currently able to access 4 weeks of paid annual leave.
- 1.14 The case of the ACTU does not disclose evidence of a pattern of employees subject to family and domestic violence exhausting their paid leave entitlements. Neither does the evidence disclose a rationale or necessity for 10 days paid leave to all employees.
- 1.15 The evidence has also disclosed that employees and unions can and do bargain for DVL in the context of enterprise agreements.

- 1.16 No attempt has been made to put on evidence relating to the specific circumstances of any individual modern award. The case of the ACTU instead seeks to establish family and domestic violence as a major social issue at large that has some intersection with the workplace. This approach cannot be easily reconciled with the relevant provisions of the Act or the requirements of the Preliminary Issues Decision.
- 1.17 For these reasons, with respect, no reasonable reading of the evidence as filed could conclude that the grant of 10 additional paid leave days to all workers is “necessary” within the meaning of s 138 of the Act.
- 1.18 We will now seek to explore the evidence heard in these proceedings, before reflecting on the requirements of the Act.

2. WHAT THE EVIDENCE DISCLOSES

- 2.1 In accordance with the directions of the Full Bench, on 16 September 2016, the Australian Chamber filed an outline of submissions which identified its case.
- 2.2 The Australian Chamber relies on those submissions and does not seek to repeat them.
- 2.3 The hearing of 5 days of evidence during 14-18 November 2016 has developed a number of themes which should be identified before the Full Bench makes its determination.

3. THE EVIDENCE OF DR COX

- 3.1 Dr Cox assisted the Full Bench by sharing her expertise in the Personal Safety Survey (**PSS**).
- 3.2 The PSS forms the primary data source of the ACTU case and is both the foundation and quantifier of a number of elements of its claim.
- 3.3 The cross-examination of Dr Cox was effective in identifying the elements of the PSS which are relevant to the Full Bench’s determination in this very specific industrial context.
- 3.4 It was also effective in identifying the difficulties of transposing a life-time experience victim’s survey into the industrial context of the 4 Yearly Review.
- 3.5 During her cross-examination Dr Cox was unable to provide the Commission with:
- (a) information as to the qualifications of the researchers for the PSS¹;
 - (b) confirmation whether those interviewing participants in the survey had themselves had domestic violence experience (although Dr Cox considered this not to be relevant)²;
 - (c) information as to what happens in interviews giving rise to the data of the PSS³; and
 - (d) detail as to how the data from 17,000 PSS households was converted to national figures.⁴
- 3.6 These limitations do not invalidate or make irrelevant the findings of the PSS in these proceedings but they do warrant consideration.
- 3.7 Further, the data from the PSS conveys a mathematical extrapolation of a subjective lifetime prevalence rate⁵ meaning that it relates to experiences which could be many decades old.⁶ This characterisation of the data means that the Commission must be cautious to equate lifetime prevalence with annual incidence.

¹ See PN176

² See PN179

³ See PN194

⁴ See PN211

⁵ See PN214

⁶ See PN219

- 3.8 Dr Cox's evidence also canvassed the recording of emotional abuse in the PSS identifying that the recording of emotional abuse was undertaken by way of subjective assessment.⁷
- 3.9 The most relevant number in respect of the PSS appears to be extrapolation that 186,900 (2.1%) women were subject to violence (assault and/or threat) by an intimate partner in the 12 months prior to the survey.⁸ When limited to cohabiting partners, this drops to 1.5% (132,500). These figures do not disaggregate those in paid employment. While it was not clear exactly how the numbers interrelated, it was apparent that this number was a subset of those 500,000⁹ women who had experienced violence generally in the previous 12 months.¹⁰
- 3.10 Dr Cox identified that PSS "can" disaggregate the severity of the violence recorded by the PSS¹¹ but Dr Cox acknowledged this data had a high relative standard error and as such did not include it in her report. This is a relevant factor given that the type of violence experienced will affect the impact of such violence.¹²
- 3.11 The PSS was able to identify whether employees who had been subject of a physical assault took time off work in the 12 months following the assault.¹³ Critically for the purposes of these proceedings, Dr Cox confirmed that for those employees who took time off work due to a physical assault, the PSS cannot identify how long the employee took off¹⁴ or if the leave was paid or unpaid.¹⁵
- 3.12 This limitation is fundamental to a case about paid leave. As such, the relevance of the PSS in assessing the utility of a claim for 10 days paid leave is considerably limited.
- 3.13 Further, cross-examination of Dr Cox confirmed that the data arising from the PSS is comparable from 2005 to 2012¹⁶ for all persons and for women for 1996-2012¹⁷.
- 3.14 As such the Commission is entitled to conclude that the Commonwealth was cognisant that domestic violence was a social issue when it framed the National Employment Standards, including an entitlement to 10 days paid personal/carer's leave.
- 3.15 Had the Commonwealth believed that DVL was warranted, or that personal/carer's leave was insufficient in relation to family and domestic violence scenarios, the Commonwealth would have included DVL in the NES or at least within the scope of personal/carer's leave.
- 3.16 Finally, there is nothing in the Cox Report which allows the Commission to assess industry by industry or by public and private sector.¹⁸ As such, in the context of the Full Bench's responsibility to review each modern award in its own right, Dr Cox's evidence is of limited use.

⁷ See PN411

⁸ See PN379

⁹ See Exhibit B-1 Cox Report at 3.6

¹⁰ See PN505

¹¹ See PN250

¹² See Dr Flood's evidence at PN724-725

¹³ See Exhibit B-1 from 6.16

¹⁴ See PN344

¹⁵ See PN346

¹⁶ See PN152

¹⁷ See PN156

¹⁸ See PN517

4. THE EVIDENCE OF DR O'BRIEN

- 4.1 While the complexity and sensitivities of this matter make discussion of costs difficult, the costing of the proposed leave is a relevant issue in the Commission's determination.
- 4.2 On the basis of its original evidence, the ACTU largely ignored the issue of costs.
- 4.3 Subsequently the statement of Dr Martin O'Brien¹⁹ was filed which sought to at least make some effort to address the economic effect of the proposed clause.
- 4.4 Avoiding any suggestion of personal criticism, the evidence of Dr O'Brien sits uneasily with the wider tenor of the ACTU's claim as well as begs a number of questions as to methodology.
- 4.5 Even with Dr O'Brien's evidence, the ACTU has not robustly engaged with the issue of costs. As put by Dr O'Brien:
- "As the FDV leave clause is simply being proposed at this stage we do not know the actual number of employees that will access FDV leave, nor their daily wage or the number of days per year they will use."*
- 4.6 The ACTU quantify the estimated uptake of the leave using the information arising from the PSS, namely that:
- (a) 1.5% of females experience violence from their cohabiting partners;²⁰
 - (b) 0.6% of males experience violence from their cohabiting partners.²¹
- 4.7 The costings arising from the O'Brien Report therefore posit that:
- (a) less than 2% of females and less than 1% of males were likely to access DVL in any given year;²²
 - (b) family and domestic violence is estimated to affect approximately 16,000 to 50,000 employees per annum and that the likely direct cost of DVL was under \$3 million per annum for award employees and just under \$9 million for collective agreement employees.²³
- 4.8 Dr O'Brien identified that his assumptions were based on an understanding that the DVL would be accessed for the purposes of legal proceedings, counselling and relocation.
- 4.9 At first blush the figures of Dr O'Brien are modest.
- 4.10 When assessed against the figures Dr O'Brien uses for all award covered and all enterprise agreement covered employees, 16,000 to 50,000 employees out of 5.93 million employees is between 0.27% and 0.84%. These figures sit uncomfortably against a claim which would provide more than a 20% increase in existing leave entitlements for all award covered employees.²⁴ This also sits uncomfortably with the general tenor of the ACTU case.²⁵
- 4.11 Dr O'Brien acknowledged that a relatively modest cohort of persons would be taking the leave and that as such the demand for DVL is likewise relatively modest.²⁶

¹⁹ See Exhibit B3

²⁰ See Exhibit B-1 Cox Report at 7.4

²¹ See Exhibit B-1 Cox Report at 7.4

²² See Exhibit B-3 O'Brien Report at 5.3

²³ See Exhibit B-3 O'Brien Report at 5.6

²⁴ See 4.18 and 4.19 of the Australian Chamber's primary submission dated 16 September 2016.

²⁵ See for example PN23

²⁶ See PN654-655

- 4.12 Notwithstanding the above and acknowledging the difficulties under which he provided his report, Dr O'Brien's report should be viewed by the Commission with an extraordinary amount of caution. This caution derives from:
- (a) the fact Dr O'Brien's modelling was undertaken on the basis of average hourly earnings, not minimum rates as relevant to the ACTU claim;²⁷
 - (b) Dr O'Brien's data simply assumes that those employees not working fulltime work 75% of a fulltime load;²⁸
 - (c) in arriving at his figures, Dr O'Brien takes Dr Cox's figure from the PSS that 2.1% of females experienced intimate partner violence in the previous 12 months²⁹. Dr O'Brien acknowledged that "family violence" is not included in this figure, nor is it reported in the PSS or the Cox Report. Dr O'Brien sought to cure this absence by "simply assum[ing] that a further 50% of those affected by partner violence may be affected by family violence";³⁰
 - (d) the modelling applied did not address the "swap-over" costs of claimants of DVL not claiming existing leave benefits such as annual leave and personal/carer's leave;³¹
 - (e) Dr O'Brien acknowledged that:

*the data is not really that useful for trying to come up with a percentage of those that are experiencing domestic violence that are likely to take leave. So in my report I list all of the relevant sources that I can see that make reference to something of relevance in that area, but at the end of the day I choose a 50 per cent simply because it's another assumption that's got such a high level of uncertainty. So I make reference to a number of things that come out of the Cox report and I don't actually use any of those figures when it comes down to the potential take-up rate of the leave, simply because it's so uncertain;*³²
 - (f) the arbitrariness of the ACTU's evidentiary position in respect of costs and how it relates to the centrepiece of its case, the PSS, is articulated by Dr O'Brien at PN637 and PN638:

I would certainly agree there's an arbitrary level to the figure that's chosen at the end, simply because it's another thing that there's simply no data available to give us a more reliable estimate to start off with, and that was similar to the family leave aspect as well....

I've mentioned [elements of the Cox Report] in passing as potentially relevant, but they don't really give the information that's required to come up with that assumption, so I agree that there's an arbitrary level to the 50 per cent, the take-up rate that is chosen in the end.;
 - (g) no administrative costs have been factored into the ACTU's estimate;³³
 - (h) the ACTU estimates provide cost modelling on the basis that one day of DVL leave is taken by enterprise agreement covered employees.³⁴

²⁷ See from PN573

²⁸ See PN579

²⁹ See PN587

³⁰ See Exhibit B-3 O'Brien Report at 3.6

³¹ See PN623

³² See PN636

³³ See PN639

³⁴ See PN645

4.13 Given the above, it is apparent that the ACTU has not developed a sufficient evidentiary position which establishes the true cost of its proposal. While the ACTU claim has largely sought to disregard or underplay cost consequences, the Australian Chamber submits that the Full Bench cannot be satisfied that the ACTU's estimates are correct, in respect of what is a fundamental variation to the employment conditions of award-covered employees.

5. ADEQUACY OF CURRENT ENTITLEMENTS AND THE PURPOSE OF LEAVE

5.1 It is necessary as a starting point to assess the adequacy of entitlements that employees currently have to deal with matters relevant to family and domestic violence.

5.2 Section 96 of the Act provides that for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

5.3 Section 97 provides that an employee may take paid personal/carer's leave if the leave is taken:

- (a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or
- (b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
 - (i) a personal illness, or personal injury, affecting the member; or
 - (ii) an unexpected emergency affecting the member.

5.4 It should be uncontroversial that this entitlement overlaps with the ACTU's DVL claim and would apply to circumstances where:

- (a) an employee is unable to attend work or is required to see a health practitioner as a result of family and domestic violence; and
- (b) an employee who is required to provide care or support to a member of his or her immediate family, or a member of the employee's household, who requires care or support because of personal injury or an unexpected emergency affecting the member as a result of family and domestic violence.

5.5 For any required leave which would not fit within the framework of personal/carer's leave, (likely to be leave required to attend court, counselling or to relocate) permanent employees are currently able to access 4 weeks of paid annual leave.

5.6 While there are some restrictions in terms of their use, these entitlements provide an existing potential bank of 6 weeks paid leave to employees to address the circumstances of family and domestic violence.³⁵

5.7 It is also relevant to note that an employee retains the right to request flexible working arrangements pursuant to s 65(1A) of the Act where that employee is experiencing violence from a member of the employee's family.³⁶ It can be inferred from this entitlement that some employees will request and secure arrangements which would otherwise be caught by the ACTU's application for DVL.

5.8 Given the operation of s 138 of the Act, the Australian Chamber submits that two questions therefore arise in assessing the ACTU's claim:

- (a) is the use of existing leave provisions to address family and domestic violence appropriate within the context of the modern award objective?

³⁵ This figure does not include paid leave arising from public holidays or long service leave.

³⁶ See PN1366

(b) if so, are the existing leave provisions sufficient?

Is the use of existing leave entitlements to address family and domestic violence appropriate?

- 5.9 The material advanced by the ACTU concerning the suitability of existing leave entitlements to address family and domestic violence appears to amount to an appeal to fairness.
- 5.10 This approach seeks to characterise existing forms of leave extremely narrowly, characterising annual leave as leave exclusively for “rest and recreation”³⁷ and advocating a characterisation of personal/carer’s leave which would exclude the circumstances of family and domestic violence.
- 5.11 With respect to the circumstances outlined at s 97 of the Act, there is no statutory or legal basis to suggest the existence of family and domestic violence renders the use of personal/carer’s leave inappropriate. So much was accepted by various witnesses under cross-examination.³⁸
- 5.12 Further, as noted above and in our primary submission, an entitlement to personal/carer’s leave was devised by the Commonwealth with full cognisance of the existence of family and domestic violence. This was further demonstrated by subsequent amendments to s 65 of the Act.
- 5.13 Ten days of paid personal/carer’s leave is a statutory and modern award minimum which applies universally (as a minimum). It is undisputed that some groups are more vulnerable to the exhaustion of their paid personal/carer’s leave entitlements than other groups. Those responsible for the care of children and those who have the misfortune of a debilitating illness or injury (to either themselves or their children) are two such groups.
- 5.14 The mere fact that a group is more likely to make use of an entitlement to personal/carer’s leave does not automatically give rise to a basis to assume that their experiences should not fall within the scope of that entitlement.
- 5.15 The ACTU’s position on the use of annual leave is likewise problematic.
- 5.16 There is no argument that it is preferable for an employee to use his or her annual leave for the exclusive purpose of rest and recreation. It is a fact however that many employees are required to use their annual leave entitlement for matters other than rest and recreation. These matters can be benign (such as moving house or getting a visa) or distressing (such as attendances at court for criminal or divorce proceedings). Indeed many employees suffering from illness or injury are required to take their annual leave when their personal leave is exhausted.
- 5.17 As was noted in the proceedings, it is self-evident that an individual may see a counsellor or financial advisor for a number of reasons.³⁹ The same would apply to attendance at court, attendance to see a lawyer, and in some cases, an urgent requirement to seek alternative accommodation.
- 5.18 Existing leave entitlements are appropriate to deal with the above situations both for those experiencing family and domestic violence and those who are not. No case has been made out which would render these entitlements inappropriate for use in the circumstances concerning this case.
- 5.19 There is a small amount of evidence which relates to circumstances where the criminal conduct of a perpetrator encroaches on the workplace (e.g. where a perpetrator seeks to contact an employee at work or attends the workplace). While it is not precisely clear what relevance this material has to a claim about paid leave, it should be noted that employers have existing responsibilities arising through work health and safety law which deal with these situations.

³⁷ See ACTU primary submission at [4.38]

³⁸ See Dr O’Brien at PN615-618, Dr Humphreys See PN1214

³⁹ See PN454, See also PN2077

Are existing leave provisions sufficient?

- 5.20 If it is appropriate that existing leave entitlements *can* be accessed to address matters concerning family and domestic violence, a further question arises as to whether these entitlements are sufficient.
- 5.21 No compelling evidence has been heard in these proceedings that establishes that existing leave provisions are inadequate to address the specific circumstances of family and domestic violence.
- 5.22 That evidence which has been filed appears to amount to:
- (a) two references in the *ALRC Family Violence and Commonwealth Laws – Improving Legal Frameworks Report (ALRC Report)*:
- “an employee experiencing family violence will quickly exhaust his or her leave entitlements but will require leave, for example, to attend court proceedings or medical appointments”*⁴⁰
- and
- “where family violence occurs over a prolonged period, people experiencing family violence may quickly exhaust their leave entitlements”*;⁴¹ and
- (b) a reference in the *Summary and Recommendations of the Royal Commission into Family Violence*:
- “The Commission heard that victims often exhaust their leave entitlements when they must attend medical appointments and court appearances, organise accommodation, and care for their family.”*⁴²
- 5.23 It is not clear how these findings were arrived at in those contexts however these findings have not been supported by the evidence filed before the Full Bench.
- 5.24 No evidence identifying the leave usage of employees affected by family and domestic violence has been presented before the Full Bench. Several witnesses confirmed that they were unaware of any examples of persons experiencing family and domestic violence running out of leave⁴³ while, despite her evidence at [12.6]-[12.7] of her second Report⁴⁴, Ms McFerran did not feel comfortable giving evidence in respect of personal/carer’s leave.⁴⁵
- 5.25 At 4.39 and 4.40 of the ACTU’s primary submissions filed 1 June 2016, the ACTU identify its 3 confidential witness statements as supporting the proposition that victims will often exhaust all their leave entitlements.
- 5.26 We cannot identify in these statements any basis for the proposition that existing leave entitlements are routinely exhausted in circumstances of family and domestic violence.
- 5.27 These witnesses identify that their experience of family and domestic violence required them to take sick or annual leave, “banked RDOs” or work make-up shifts. One confidential witness appears to have taken long-service leave during an extended period of leave to move interstate.
- 5.28 In our view, such evidence does not support the proposition that the existing leave entitlements applying to all employees under the NES are insufficient or are routinely exhausted.

⁴⁰ See ACTU primary submission at 8.30 citing ALRC Report at 16.57

⁴¹ See ALRC Report at 17.30

⁴² See Summary and Recommendations of Royal Commission into Family Violence March 2016 p 1637 of 2082

⁴³ See Eckersley at PN1828-1829, at PN2184 Kemppi acknowledged that he had never undertaken a study of the taking of leave entitlements in the public sector

⁴⁴ See Exhibit B-16

⁴⁵ See PN2297

5.29 In the absence of such evidence, the grant of the ACTU claim cannot be described as one consistent with ss 134 and 138 of the Act.

6. EVIDENCE OF BARGAINING

6.1 The evidence of union officials⁴⁶ demonstrates unequivocally that DVL is a matter which can and is bargained for through enterprise bargaining.

6.2 Each of the union witnesses acknowledged a process whereby their union can serve a log of claims on an employer⁴⁷ and, in circumstances where the employer does not agree to those claims, undertake protected industrial action to support such claims.⁴⁸

6.3 As the Full Bench has heard, bargaining has created a number of different forms of clauses, presumably tailored to the specific arrangements applying at the workplace (or in the relevant industry).

6.4 With respect, the position put by the ACTU that the insertion of a uniform DVL entitlement into modern awards is necessary to assist employees to secure DVL entitlements in enterprise agreements is not tenable. As the evidence demonstrates, many enterprise agreements have included DVL entitlements notwithstanding the absence of DVL from an underlying award. Further, the ability of employees and unions to bargain for DVL would be negated if DVL was introduced as a uniform entitlement.

6.5 The evidence of Mr Kemppi identified the basis of this argument at PN2198-99:

Are you simply saying [at [29] of your statement] that by putting it in the award, it would be easier to put in your enterprise agreements?---For those workers who are on enterprise agreements already or will be on enterprise agreements, what I'm saying is that if there were an entitlement in a modern award, the boot test and things like that which relate to the interaction between awards and enterprise agreements, would come into play and there would be much stronger likelihood of collective bargaining around an entitlement for family and domestic violence leave.

That is at least equivalent to that in the award?---That is at least equivalent, yes.

6.6 The effect of this evidence amounts to an argument that if DVL was in an underlying award it would no longer be necessary to bargain for it. The relevance of this to the modern awards objective will be discussed further below.

6.7 The ACTU attempt to prosecute an argument that, in the absence of an award standard, an entitlement for DVL will not be consistent across all employees. With respect, the only meaningful prospect of a consistent standard for DVL is the insertion of that entitlement into the NES.

6.8 As was developed in the cross-examination of Ms Jackson⁴⁹, no consistent standard can ever apply in the context of enterprise bargaining as the entitlement will always be subject to the specific nature and bargaining position of the parties.

7. DIFFICULTY OF IDENTIFICATION

7.1 One aspect of the hearing which was perhaps unexpected was the uncertainty amongst witnesses as to when the proposed entitlement would be triggered. This was particularly the case in relation to the evidence concerning economic abuse.

⁴⁶ See statements of Gandy, O'Neil, Doleman, Kemppi and Jackson

⁴⁷ See PN1376 per Jackson, PN1466 per Doleman, PN1595 per Gandy, PN2171 for Kemppi

⁴⁸ See PN1379 per Jackson, PN1482 per Doleman, PN2180 for Kemppi

⁴⁹ See PN1387

- 7.2 The evidence of Dr Cortis was that in order to understand whether someone had been subjected to economic abuse, you would be required to understand the underlying motivations of the perpetrator and the “*experience of the woman affected*”.⁵⁰ Dr Cortis then acknowledged that, notwithstanding her position as a researcher in the field of economic abuse, she was unable to objectively determine whether economic abuse was occurring in a particular situation.⁵¹ Dr Humphreys likewise identified difficulties in identifying behaviours that would be caught by the ACTU claim.⁵²
- 7.3 At the most serious end of the scale, there is no argument that certain behaviours clearly constitute family and domestic violence. As was apparent from questioning from the Full Bench however, the full scope of what constitutes family and domestic violence is difficult to define.
- 7.4 It was accepted by Dr Cortis that in the context of a heated and contested divorce, factors giving rise to economic abuse are likely to appear.⁵³ Indeed it was apparent on the basis of the evidence at the hearing that a relationship issue of any degree of intensity may trigger the entitlement depending on the subjective position of the parties involved.
- 7.5 The objective fact that domestic and family violence is occurring is relevant to the exercise of the proposed leave. This is because it is the existence of family and domestic which serves to crystallise the entitlement to take leave.
- 7.6 On this subject, the ACTU attempt to draw an analogy between the proposed DVL entitlement and personal/carer’s leave, stating that such leave “*does not require an employer to determine whether or not an employee is actually sick, they just need to be satisfied that the person for example went to the doctor that day.*”⁵⁴
- 7.7 With respect, this analogy is not apt.
- 7.8 The entitlement to personal/carer’s leave in respect of ill health does not arise from a decision to attend a doctor. It arises because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.⁵⁵
- 7.9 This means that the fact of an employee’s fitness for work is the relevant criteria for assessing an entitlement to leave.
- 7.10 Similarly, the fact that an employee is being subject to family and domestic violence must also be relevant to an assessment to an entitlement to DVL.
- 8. CHARACTER OF THE ACTU EVIDENCE**
- 8.1 It is clear that the circumstances of family and domestic violence are complex and interrelated.
- 8.2 This means that there is no single solution to assist those suffering abuse.
- 8.3 At various times in these proceedings, the hearing threw up criticisms of the Australian system in relation to family and domestic violence including criticisms of the family law system of Australia⁵⁶ and the housing market.⁵⁷

⁵⁰ See PN936

⁵¹ See PN941

⁵² See PN1188-1201

⁵³ See PN1074

⁵⁴ See PN975

⁵⁵ See s 97 of the Act

⁵⁶ See for example PN1223 per Dr Humphreys

⁵⁷ See PN1227

- 8.4 It was apparent that the witnesses brought by the ACTU were largely advocates of DVL in a political or social sense. This was perhaps best demonstrated by the evidence of Ms McFerran⁵⁸ who unambiguously presented an advocate's perspective on matters relating to family and domestic violence.
- 8.5 This has resulted in much of the ACTU's evidentiary case being advanced by way of submission.
- 8.6 In doing so, the evidence in this case focussed on the most vulnerable in society. By way of example, the "*Journeys Home*"⁵⁹ report identified and relied on by Dr Cortis used a sample of respondents who were either homeless or considered by Centrelink to be at risk of becoming homeless,⁶⁰ 50% of which were not in the labour force and only 20% who were employed at the commencement of the survey.⁶¹ Such a sample is clearly not representative of the persons relevant to this case.
- 8.7 Dr Cortis identified that women who are subject to family and domestic violence, if they are independently employed, if they have independent control over their financial resources and if they have independent control over their assets, are likely to be in a better position to cope with the family and domestic violence.⁶² Conversely, women who are subject to domestic and family violence who are unemployed, have no control over financial resources and no control over their assets are in a worse situation.⁶³
- 8.8 Professor Humphreys acknowledged that those experiencing "*a deep and ongoing pattern of abuse*"⁶⁴ were the subject of her description of the impact of family and domestic abuse at 2.5 of her report before identifying that the effects of abuse are "*not one size fits all*."⁶⁵ The Professor also acknowledged that if one experienced a single domestic violence event more than 10 years ago (as contemplated by the PSS) her description at 2.5 of her report was less likely to apply.⁶⁶
- 8.9 The evidence of Ms Jocelyn Bignold concerning McAuley Community Services for Women can be similarly characterised as dealing with the most vulnerable of society.
- 8.10 The evidence of Ms Marilyn Beaumont is not overly probative of any fact in issue and is largely submission. In providing her personal opinion of what a supportive workplace should provide, Ms Beaumont does not assist the Commission.⁶⁷
- 8.11 Finally, it is relevant to note that a proportion of the ACTU witness evidence refers to matters which are unable to be tested as the subject of the evidence is unidentified.⁶⁸ This evidence is variously described as "*case studies*", "*excerpts from interviews*" or "*examples*". Such material is hearsay, highly prejudicial and unable to be verified.
- 8.12 As was confirmed during the hearing, this material is advanced as evidence of the basis for the opinions witnesses have formed.⁶⁹
- 8.13 Given such characterisation, and the fact that the evidence is unable to be tested, such evidence should be afforded little to no weight in determining the matters before the Full Bench.

⁵⁸ See PN2293

⁵⁹ See Exhibit B-5

⁶⁰ See PN1010

⁶¹ See PN1013-1019

⁶² See PN1047

⁶³ See PN1050

⁶⁴ See PN1217

⁶⁵ See PN1217

⁶⁶ See PN1222

⁶⁷ See PN1308, 1318

⁶⁸ See Exhibit B-17 at [12] from 5th Sentence, [21], [23.3], Exhibit B-11 at [23], [27], [29] and [54] and related attachments, Exhibit B-12 at [35], [51] and [54], Exhibit B-18 at [22], [25], [27], [29], [33], [34], [35], [37] and [42], B-21 at [12] final two sentences and [19], Exhibit B-22 at [12] and [21].

⁶⁹ See PN1638-9

9. EVIDENCE OF CONFIDENTIAL WITNESSES

- 9.1 The 3 confidential witnesses in these proceedings were not cross-examined.
- 9.2 For present purposes it is sufficient to note that a review of this evidence:
- (a) does not immediately disclose whether these witnesses are covered by modern awards relevant to these proceedings or the 4 yearly review;
 - (b) does not provide an evidentiary basis for the proposition that employees who are subject to family and domestic violence routinely exhaust their existing leave entitlements; and
 - (c) indicates that circumstances of family and domestic violence will differ for different employees in different circumstances and that employers and workplaces can provide meaningful assistance and support to their employees notwithstanding that no current modern award DVL entitlement exists.

10. EVIDENCE OF PwC

- 10.1 The evidence of PwC does not provide support for the ACTU's claim.
- 10.2 Ms Eckersley's evidence confirmed that PwC:
- (a) is an organisation with 7000 employees and 500 partners⁷⁰ in Australia with 200,000 employees worldwide;⁷¹
 - (b) are in a different financial position to businesses ordinarily covered by Modern Awards with a FY2016 gross revenue of US\$1.4 Billion in Australasia and the Pacific Islands and a FY2016 gross revenue of US\$35 Billion worldwide.⁷²
- 10.3 These attributes give rise to employment conditions at PwC which bear little resemblance to the minimum standards relevant to ss 134, 138 and 156 in this Review. As Ms Eckersley confirmed, PwC provides market leading⁷³ and best practice⁷⁴ employment conditions to its employees. In formulating its DVL policy, PwC had regard to comparable businesses such as Telstra and NAB⁷⁵, which like PwC, are almost entirely alien to the average award covered business.
- 10.4 It is also relevant that PwC had the benefit of being able to provide training to relevant staff members, at a cost of approximately \$23,000⁷⁶ while its DVL policy was created with the assistance of a number of distinguished experts including the current Federal Sex Discrimination Commissioner and the Executive General of the UN Women National Council Committee through the connections of the PwC partners.⁷⁷ It is self evident that these advantages are not available to most award-covered businesses in implementing a policy addressing paid leave.
- 10.5 Given the position of PwC, its policy was implemented with little to no regard to cost.⁷⁸ Unlike PwC, the Full Bench is required to assess the costs of a proposal to introduce DVL.
- 10.6 A comparison between the PwC policy and the ACTU claim is however instructive to quantify the scale of the ACTU claim. Despite the fact that the ACTU clause is proposed to be inserted into a minimum safety net

⁷⁰ See PN1793

⁷¹ See PN1794, Ms Eckersley could not identify however how many PwC employees were covered by Modern Awards, see PN1779

⁷² See PN1797-8

⁷³ See PN1817

⁷⁴ See PN1818

⁷⁵ See PN1890

⁷⁶ See PN1860

⁷⁷ See PN1868

⁷⁸ See PN1848-PN1854

applying to all businesses and the PwC clause is intended to fit the circumstances of a multi-billion dollar global business, the entitlement to paid leave under both regimes is identical at 10 days.

- 10.7 In fact, the ACTU claim in some respects goes further than the PwC clause in that the PwC clause does not include paid leave for casuals. Ms Eckersley identified that:

casual employees do not receive paid leave in our other policies as well. So no entitlement to annual leave, statutory leave in that regard, so we applied the same thinking and lens to that.

- 10.8 Ultimately, the experience of PwC demonstrates the ability of businesses, even without employee⁷⁹ or union⁸⁰ pressure, to pursue and implement DVL policies if desired. The evidence of PwC also demonstrates that where DVL is available, employees will not necessarily take the full entitlement of 10 days.⁸¹

11. JUSTIFICATION OF THE 10 DAY QUANTUM

- 11.1 No evidentiary basis has been developed by the ACTU to justify the quantum of 10 days paid leave.
- 11.2 The ACTU's model clause developed for enterprise bargaining incorporates a figure of 20 days which it describes as a "more appropriate figure" than 10 days⁸² however in the context of minimum terms and conditions and in view of some "stakeholder support", the ACTU accepts that 10 days is an "appropriate minimum figure".⁸³
- 11.3 The appropriateness of this figure is not developed in the ACTU's case however.
- 11.4 Where evidence has been heard relating to the actual use of leave by employees (for example under DVL policies of PwC who identified that they "haven't had to use ...10 days domestic violence leave very often at all"⁸⁴ and Telstra who identified that the average leave taken under its policy was 2.3 days⁸⁵) such evidence has not supported the proposition that 10 days is an appropriate minimum for a fair and relevant safety net.
- 11.5 As a first step, in order to establish that an award of 10 days DVL was warranted, it would be necessary to identify the "swap-over" or conversion cost of the personal/carer's leave or annual leave which is currently being used for family and domestic violence scenarios.
- 11.6 This has not been done.
- 11.7 In short, no methodology has been developed to identify why the insertion of 10 days paid DVL is necessary to satisfy the modern awards objective for all modern awards. This failing is sufficient to warrant the dismissal of the claim.

12. REQUIREMENTS OF THE ACT

- 12.1 Ultimately, beyond the scope of social discourse, the Full Bench will be required to apply the requirements of the Preliminary Issues Decision and the Act to the evidence presented before it. The legislative requirements applying to these proceedings were canvassed comprehensively in our initial submission and will be addressed in our oral submission.
- 12.2 In summary, this framework provides as follows:

⁷⁹ See PN1842

⁸⁰ See PN1843

⁸¹ See PN1898

⁸² See ACTU primary submission at [10.6]

⁸³ See ACTU primary submission at [10.6]

⁸⁴ See PN1898

⁸⁵ See Male Champions of Change (November 2015), Playing Our Part: Workplace Responses to Domestic and Family Violence at p 17

- (a) Given that the ACTU claim is substantive and material, a compelling case supported by probative evidence is required to be advanced by the ACTU.
 - (b) In exercising any discretion, the Full Bench can only include in modern awards (relevantly for these proceedings) terms about matters in section 139 of the Act and section 142.
 - (c) Each award must be considered in its own right against the modern awards objective.
 - (d) To vary an award, the case satisfying the requirements of the Preliminary Issues Decision⁸⁶ must be made out for that award.
 - (e) In exercising any discretion the Full Bench can only vary an award “to the extent necessary” to meet the modern awards objective.⁸⁷ If a claim goes beyond what is necessary to achieve the modern awards objective, the Full Bench has acted outside of its jurisdiction.
 - (f) At the heart of the modern awards objective is the setting of a fair and relevant minimum safety net.
 - (g) The focus here is on minima.
 - (h) The starting point for this matter is that each of the modern awards that are subject to the claim prima facie met the modern awards objective at the time they were made.⁸⁸
- 12.3 Section 134(1) of the Act sets out the modern awards objective.
- 134(1)(a) Relative Living Standards and the Needs of the Low Paid*
- 12.4 The difficulty in assessing this limb of the modern awards objective in these proceedings is that much of the evidence provided by the ACTU either cannot be disaggregated by socio-economic status (such as the PSS) or otherwise concerns persons not in the workforce.
- 12.5 It was established by Ms McFerran⁸⁹ and Dr Cox⁹⁰ that socioeconomic status does not affect the likelihood of being a victim of family and domestic violence however it appears that the more educated you are the more likely you are to be a victim of violence.⁹¹
- 12.6 The ACTU has advanced no probative evidence as to why the grant of leave as claimed goes to this limb of the modern awards objective.
- 12.7 The evidence as to the likely take-up of the proposed leave is also relevant to this limb. If the evidence of Dr O’Brien is correct, the demand and use for this entitlement is not at a level which would warrant a wholesale recalibration of the leave model under modern awards.
- 134(1)(b) - The need to encourage collective bargaining*
- 12.8 As noted above, DVL is currently the subject of enterprise bargaining in a number of contexts and industries.
- 12.9 To introduce it as a uniform entitlement, particularly at the level of 10 days, would be to remove the impetus of employees to bargain for the entitlement. As was disclosed by the evidence, in the right circumstances, DVL appears to represent an opportunity for unions, employees and employers to agree on a common and relevant position in the context of an individual workplace.

⁸⁶ [2014] FWCFB 1788

⁸⁷ See s 138 of the Act

⁸⁸ Preliminary Issues Decision [2014] FWCFB 1788 at [24]

⁸⁹ See PN2302

⁹⁰ See PN388

⁹¹ See PN383

12.10 To externally impose a 10 day minimum condition on all employees would be to remove considerable impetus to bargain around the issue and therefore could not be said to encourage collective bargaining. As identified above with reference to Mr Kemppe's evidence, merely removing any difficulty for unions to achieve claims for 10 days DVL in enterprise bargaining does not encourage collective bargaining within the meaning of the Act.

134(1)(c) - The need to promote social inclusion through increased workforce participation

12.11 There is no evidence in this matter that a lack of paid family and domestic violence leave entitlements prevents participation in the workforce and results in a form of social exclusion.

12.12 It appears that it is the existence of employment and a level of control or autonomy over finances which is critical in the assessment of the effects of family and domestic violence⁹², not the existence of an entitlement to paid leave.

12.13 It is significant that those most affected (and socially excluded) by family and domestic violence are those subject to domestic violence who are unemployed, having no control over financial resources and no control over assets.⁹³

12.14 While some evidence has been produced which goes to the importance of maintaining employment for those experiencing family and domestic violence, we are unable to identify any evidence which establishes that employees have been terminated by reason of their experience of family and domestic violence. If such evidence had been brought, it would be relevant to note the protections that employees currently have against such actions including access to the unfair dismissal jurisdiction.

12.15 The evidence simply supports a proposition that persons in the workforce may need to absent themselves from time to time from being at work because of the impact of family and domestic violence. As we develop above, no case has been made to establish that the existing forms of leave are insufficient to achieve this aim.

134(1)(d) - The need to promote flexible modern work practices and the efficient and productive performance of work

12.16 In our submission the notion of the efficient and productive performance of work extends to the broader cost structures within which labour is engaged and this would include the extent of leave an employee can access as we submitted above an employer will either lose output through an absence or be required to fund a replacement (overtime, casual, labour hire).

134(1)(da) - The need to provide additional Remuneration

12.17 This limb appears to have no work to do in this case.

134(1)(e) - The principle of equal remuneration for work of equal or comparable value

12.18 This limb appears to have no work to do in this case.

134(1)(f) - the likely impact on exercising modern award powers on business including on productivity, employment costs and the regulatory burden

12.19 As developed above, no credible costs evidence has been put forward by the ACTU which could satisfy the Full Bench of the costs arising from the ACTU's claim.

⁹² See Dr Cortis at PN1047

⁹³ See Dr Cortis at PN1050

- 12.20 Particularly with respect to the “swap-over” costs between leave which would have been taken as paid personal/carer’s or annual leave and the new entitlement, no assessment has been made to assess the financial impact of the claim.
- 12.21 The fact is that the claim will impact business and administration costs. There is simply no authoritative evidence before the Full Bench to assess or understand these costs in granting the claim.
- 134(1)(g) - the need to ensure a simple, easy to understand stable and sustainable modern award system for Australia*
- 12.22 As developed above, the creation of an entitlement that would be triggered in objectively ambiguous circumstances and which would only apply to an extremely small proportion of the working population is likely to reduce the simplicity of the modern awards system.
- 12.23 Introducing a new and complex benefit is the opposite of simplicity and the more added to the safety net by definition increases the likelihood of instability.
- 134(1)(h) - the likely impact of exercising modern award powers on employment growth, inflation and the sustainability performance and competitiveness of the national economy*
- 12.24 This limb of section 134 requires the Commission to consider the likely impact of exercising its power in the context of the broader economy.
- 12.25 As noted above, the Full Bench has not been placed in a position where it can reasonably identify a cost on the proposed entitlement. In light of this position, we submit that it would be inappropriate to impose an additional requirement without having been able to assess the likely costs ramifications.

13. CONCLUSION

- 13.1 In the view of the Australian Chamber, these proceedings can be summarised in a set of relatively simple propositions:
- (i) while the certain witnesses have expressed a disinclination against the taking of personal/carer’s leave and annual leave to address matters relating to family and domestic violence, no case has been made that an additional form of leave is appropriate or necessary;
 - (ii) the circumstances giving rise to an entitlement to take leave in cases of family and domestic violence are in part addressed by the granting of 10 days paid personal/carer’s leave to all employees;
 - (iii) for the remaining circumstances which do not concern the health of an employee or their carer responsibilities (such as attendance at court, counselling or with an advisor), employees are entitled to take annual leave;
 - (iv) no evidence has been led which would allow the Full Bench to review each of the 122 modern awards in their own right;
 - (v) the imposition of DVL into Modern Awards would be piecemeal when assessed against family and domestic violence as a social issue. The ACTU claim will do nothing for the unemployed or for the “award-free”;
 - (vi) parties can and do bargain for DVL entitlements, with some employers introducing a formal entitlement even outside the context of bargaining;

(vii) even without formal entitlements to DVL in enterprise agreements and policies, the Full Bench has before it evidence that employers can and do exercise discretion assist employees who are experiencing family and domestic violence.

13.2 In our respectful submission, the ACTU has not established a sufficient case having regard to the requirements of the Preliminary Issues Decision or the Act and as such the Full Bench should refuse the ACTU's application.

Australian Chamber Members

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